

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KIMBERLY D. STEWART**  
Claimant

VS.

**OLATHE MEDICAL CENTER, INC.**  
Self-Insured Respondent

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Docket Nos. 1,034,372  
and 1,042,551<sup>1</sup>

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the March 1, 2011, Award entered by Special Administrative Law Judge Jerry Shelor. The Board heard oral argument on June 7, 2011. Mark S. Gunnison, of Overland Park, Kansas, appeared for claimant. Michael P. Bandre, of Kansas City, Missouri, appeared for the self-insured respondent.

The Special Administrative Law Judge (SALJ) denied claimant benefits in Docket No. 1,042,551. In Docket No. 1,034,372, the SALJ found that claimant had provided respondent with timely notice. The SALJ found that claimant had been underpaid temporary total disability benefits for the period between January 26, 2006, to March 26, 2006<sup>2</sup>; from January 4, 2008, to August 20, 2008; and from April 1, 2009, to January 13, 2010, in the total amount of \$7,582.98. The SALJ denied claimant's request for temporary total disability benefits for the period of April 14, 2007, through January 3, 2008. The SALJ found that claimant was entitled to medical mileage for claimant's treatment with Dr. Guinn. The SALJ also found that claimant had a 7 percent permanent partial impairment to the left upper extremity at the level of the forearm.

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<sup>1</sup> At the regular hearing, claimant's attorney told ALJ Marcia Yates Roberts that "we have stipulated that with regard to the second accident in '07 [Docket No. 1,042,551], there was no additional injury, aggravation, or new injury or impairment and I'll—the claim really is entirely focused on the first injury [Docket No. 1,034,372]." R.H. Trans. at 11.

<sup>2</sup> Claimant was released by Dr. Moore on March 6, 2006, not March 26, 2006. The pretrial stipulations show that claimant was paid temporary total benefits from January 26, 2006 to March 7, 2008, a period of 5.86 weeks. When the Award was calculated, the SALJ awarded temporary total disability compensation for 8.57 weeks rather than 5.86 weeks for this period.

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

Claimant requests review of the SALJ's finding that she was not entitled to temporary total disability benefits for the period from April 14, 2007, through January 3, 2008. She contends the lack of restrictions imposed by Dr. Moore is "inconsequential" because he had not properly diagnosed her and Dr. Guinn would have imposed restrictions if he had been her authorized treating physician.

Respondent argues the SALJ correctly found that claimant failed to prove she was entitled to temporary total disability benefits for the period of April 14, 2007, through January 3, 2008, as there was no medical evidence presented in the record to indicate claimant was rendered completely and temporarily incapable of engaging in substantial and gainful employment.

The issue for the Board's review is: Is claimant entitled to temporary total disability benefits for the period from April 14, 2007, through January 3, 2008?

### FINDINGS OF FACT

Claimant worked for respondent as an emergency department technician (ED Tech). On January 2, 2006, a stocking cart tipped forward on her and injured her left wrist and hand. She sought treatment about a week later and was eventually referred by respondent to Olathe Occupational Management and then Dr. J. B. Moore. Dr. Moore released her to return to work on March 8, 2006, with a splint and a restriction of no lifting over 5 to 10 pounds. She was allowed to use her left arm and hand. Respondent provided claimant with work within her restrictions. Claimant testified she returned to work and tried to do her job as an ED Tech. However, her wrist hurt and she could not do her job adequately. She testified that in May 2006 she, therefore, asked to be placed on p.r.n. status and looked for other work. She found a job as a waitress in a Mexican restaurant.

Claimant's supervisor, Cynthia Kolich, testified that on May 11, 2006, she received a note from claimant. In the note, claimant indicated she had obtained a second job and asked to go part time starting the next week.<sup>3</sup> Because respondent had no part-time jobs available, claimant was offered p.r.n. status instead. Ms. Kolich testified that when she spoke with claimant, claimant did not mention her wrist condition as being a reason she needed to change her job status. Claimant accepted p.r.n. status and started in that capacity on May 25, 2006. However, she did not start work at the Mexican restaurant at that time because the restaurant owner was concerned that she would drop something.

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<sup>3</sup> Kolich Depo., Ex. 1.

The restaurant owner told claimant to wait until after her wrist was better before starting work at the restaurant.

Claimant continued to work at respondent through April 13, 2007. She was released from treatment by Dr. Moore in April 2007.<sup>4</sup> However, she testified she was still having problems with her left wrist and was unable to work. She was scheduled to work on May 2 and May 7, 2007, but she did not appear for work on those days. In July 2007, claimant was terminated by respondent because she had not worked for a period of 90 days.

On October 23, 2007, by agreement between the parties' counsel and Order of ALJ Robert Foerschler, claimant was seen by Dr. O. Allen Guinn, III, for an independent medical examination (IME). At the IME, claimant told Dr. Guinn that she was having pain that radiated down her thumb to her left wrist and had decreased range of motion in her left wrist. Dr. Guinn believed that claimant had a possible tear of some of her left wrist ligaments and recommended an MRI. The MRI showed thinning of the triangular fibrocartilage complex (TFCC) but no clear tear. Dr. Guinn met with claimant again on December 6, 2007, at which time he recommended a diagnostic arthroscopy to definitively determine whether she had ligament tears and if so, the location of the tears. The arthroscopy was performed on January 4, 2008, and it was found that claimant had avulsed the ulnar aspect of the TFCC from its attachment point at the ulnar fovea. Dr. Guinn repaired the avulsion. Claimant was taken off work by Dr. Guinn on January 9, 2008.<sup>5</sup> Dr. Guinn continued to treat claimant, and she had a second surgery in July 2008. She was released to return to work on August 21, 2008. She later had two more surgical procedures on her left wrist and was off work again from April 1, 2009, through January 13, 2010. Dr. Guinn rated claimant as having a 7 percent permanent partial impairment of the left upper extremity at the level of the forearm.<sup>6</sup>

Claimant has stipulated that she received temporary total disability benefits from January 26, 2006, through March 7, 2006; from January 4, 2008, through August 20, 2008;

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<sup>4</sup> Dr. Moore's medical records were not made a part of the record so it is not possible to know for sure when and if he lifted claimant's original restrictions. However, at the Regular Hearing, claimant was asked by respondent's attorney if Dr. Moore had released her to full duty with no restrictions in November 2006, and claimant answered that she did not remember the date. R.H. Trans. at 38-39. Claimant's briefs acknowledge claimant was released without restrictions by Dr. Moore. Claimant's Brief at 3-4, filed April 4, 2011; Claimant's Reply Brief at 2, filed May 6, 2011.

<sup>5</sup> In his deposition, Dr. Guinn acknowledged that he first took claimant off work on January 9, 2008. Dr. Guinn's work slip on that date released claimant to modified duty and gave her restrictions of no use of her left arm, no lifting, no climbing and limited repetitive motion. She was to work in a clean and dry environment and to wear a splint while working.

<sup>6</sup> There is no evidence that this rating was based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). However, the submission letters of both respondent and claimant indicate the parties stipulated that claimant had a 7 percent impairment to her left forearm as a result of the accident of January 2, 2006.

and from April 1, 2009, to January 13, 2010, albeit at the wrong compensation rates. She was denied temporary total disability benefits from April 14, 2007, the day after her last day of work at respondent, through January 3, 2008, the day before her first surgery performed by Dr. Guinn. The record does not reveal that any doctor took claimant off work from March 2006 until January 2008. Dr. Guinn saw claimant for his IME in October 2007. He did not take claimant off work at that time, testifying that as an independent examiner rather than a treating physician, he was not able to take her off work. On October 23, 2007, he only indicated that claimant should continue with her current restrictions, although it was his understanding that Dr. Moore had released her with no restrictions. When claimant was seen a second time by Dr. Guinn in December 2007, he again indicated she should continue with her current restrictions.

Dr. Guinn testified he did not take over the treatment of claimant until January 4, 2008, when he performed surgery on her left wrist the first time, and so was unable to place her under any restrictions until that time. He testified that had he been able to place restrictions on her at the IME, he would have given her temporary restrictions of a one-pound lifting restriction, would have put her in a wrist cock-up splint, and would have limited repetitive use of her affected arm. He would have imposed those restrictions from the time of her release by Dr. Moore in April 2007 until the condition of her wrist had improved. Claimant has testified that she would not have been able to perform the duties of an ED Tech during the period of time from April 14, 2007, through January 3, 2008, because of the condition of her left wrist and hand. Claimant said specifically she would not have been able to perform CPR. Dr. Guinn, in his deposition testimony, agreed that as of October 23, 2007, claimant would have been unable to perform the job duties of an ED Tech. Ms. Kolich, however, testified that if claimant would have brought in a medical release limiting her to one-armed duty, respondent would have been able to accommodate that restriction.

#### **PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510c(b)(2) provides:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of

substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

### **ANALYSIS**

In retrospect, Dr. Moore's release was premature. As shown by claimant's subsequent treatment with Dr. Guinn, claimant was not at maximum medical improvement. Likewise, Dr. Guinn opined that if claimant had been his patient in October 2007 when he first saw claimant for the IME, he would have recommended restrictions of no lifting over one pound and no repetitive use of the left arm, and he would have placed her left wrist in a cock-up splint. Claimant would have effectively been limited to one-hand or one arm duty. Mrs. Kolich's testimony that respondent would have accommodated those restrictions is credible, given that respondent had previously accommodated claimant's restrictions from Dr. Moore.

Claimant seeks additional weeks of temporary total disability compensation for the period of April 14, 2007, through January 3, 2008. However, there is no medical evidence that claimant was in need of medical restrictions between April 14, 2007, and October 23, 2007, when she was first seen by Dr. Guinn. And Dr. Guinn's restriction, even if applied retroactively, would not keep claimant from working. Those restrictions may have prevented claimant from performing all of her regular job duties with respondent, but claimant was no longer employed with respondent during this time period for which temporary total disability compensation is being sought. There are jobs claimant could perform within Dr. Guinn's restrictions. Therefore, claimant was not "incapable of engaging in any type of substantial and gainful employment."<sup>7</sup> Claimant has failed to prove she is entitled to temporary total disability compensation for the period of April 14, 2007, through January 3, 2008.

### **CONCLUSION**

The SALJ's Award should be affirmed as to both docketed claims, except that the award contains calculation errors that should be corrected.<sup>8</sup>

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<sup>7</sup> K.S.A. 44-510c(b)(2).

<sup>8</sup> The SALJ's Award states that claimant was entitled to 8.57 weeks of temporary total disability compensation for the period from January 26, 2006, to March 26, 2006. Claimant was released to return to work on March 8, 2006. The period from January 26, 2006, to March 8, 2006, is 5.86 weeks. Also, in the Award, the compensation rate for claimant's permanent partial disability was based on claimant's average weekly wage including fringe benefits. However, her permanent partial disability compensation would have been paid out before May 25, 2006, the date claimant lost her fringe benefits.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated March 1, 2011, is affirmed as to the denial of benefits in Docket No. 1,042,551 and affirmed in Docket No. 1,034,372 as to the denial of the weeks of additional temporary total disability benefits for the period of April 14, 2007, through January 3, 2008. The award calculation is modified as follows:

Claimant is entitled to 5.86 weeks of temporary total disability compensation at the rate of \$331.92 per week in the amount of \$1,945.05, followed by 8.34 weeks of permanent partial disability compensation, at the rate of \$331.92 per week, in the amount of \$2,768.21 for a 7 percent loss of use of the forearm, followed by 75 weeks of temporary total disability compensation at the rate of \$372.46 per week in the amount of \$27,934.50, making a total award of \$32,647.76, which is all due and owing less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark S. Gunnison, Attorney for Claimant  
Michael P. Bandre, Attorney for the Self-Insured Respondent  
Jerry Shelor, Special Administrative Law Judge  
Marcia Yates Roberts, Administrative Law Judge